

# FEDERAL COURT OF AUSTRALIA

## Birch, in the matter of Geelong Fire Services Pty Ltd (Administrators Appointed) [2022] FCA 963

File number: VID 451 of 2022

Judgment of: **MOSHINSKY J**

Date of judgment: 12 August 2022

Date of publication of reasons: 18 August 2022

Catchwords: **CORPORATIONS** – administration – application for order relieving the administrators of personal liability in relation to a funding agreement with parent of company in administration – application for order to give effect to a security interest over the company’s assets – order made

Legislation: *Corporations Act 2001* (Cth), ss 435A, 436A, 443A, 447A, 513C, 588FL, 588FM, Sch 2, *Insolvency Practice Schedule (Corporations)*, s 90-15

Cases cited: *Dickerson, in the matter of McWilliam’s Wines Group Ltd (Administrators Appointed) (No 2)* [2020] FCA 417  
*Hill, in the matter of Ovato Limited (Administrators Appointed)* [2022] FCA 903  
*In the matter of RCR Tomlinson Ltd (administrators appointed)* [2018] NSWSC 1859  
*Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2017] FCA 1144; 35 ACLC 17-044  
*Re Unlockd Ltd (administrators apptd)* [2018] VSC 345  
*Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* (2020) 144 ACSR 347

Division: General Division

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National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

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Counsel for the Plaintiff: Ms RT Zambelli

Solicitor for the Plaintiff: Hamilton Locke

# ORDERS

VID 451 of 2022

**IN THE MATTER OF GEELONG FIRE SERVICES (ACN 073 604 163)  
(ADMINISTRATORS APPOINTED)**

**BETWEEN:                    THOMAS DONALD BIRCH, GLENN JOHN SPOONER AND  
                                     JEREMY JOSEPH NIPPS IN THEIR CAPACITY AS JOINT  
                                     AND SEVERAL VOLUNTARY ADMINISTRATORS OF  
                                     GEELONG FIRE SERVICES (ACN 073 604 163)  
                                     (ADMINISTRATORS APPOINTED)  
                                     Plaintiffs**

**ORDER MADE BY:    MOSHINSKY J  
DATE OF ORDER:    12 AUGUST 2022**

## **THE COURT ORDERS THAT:**

### *Limitation of Administrators' Liability*

1. Pursuant to s 447A(1) of the *Corporations Act 2001* (Cth) (***Corporations Act***), and s 90-15 of the *Insolvency Practice Schedule (Corporations)*, being Sch 2 to the *Corporations Act* (**IPSC**), Pt 5.3A of the *Corporations Act* is to operate in relation to the plaintiffs as if s 443A(1) of the *Corporations Act* provides that:

- (a) the liabilities of the first plaintiffs (in their capacity as administrators of the second plaintiff) incurred with respect to any obligations arising out of, or in connection with any loan facility agreement substantially in accordance with the form exhibited to the affidavit of Thomas Donald Birch sworn on 11 August 2022 (**Birch Affidavit**) (**Loan Facility Agreement**), between the first plaintiffs and Firesafe Group Pty Ltd (ACN 619 974 033) (**Firesafe**) are in the nature of debts incurred by the first plaintiffs in the performance and exercise of their functions as joint and several administrators of the second plaintiff; and
- (b) notwithstanding that the liabilities in subparagraph (a) are debts incurred by the first plaintiffs in the performance and exercise of their functions as joint and several administrators of the second plaintiff, the first plaintiffs will not be personally liable to repay such debts, or satisfy such liabilities to the extent that the property of the second plaintiff is insufficient to satisfy the debts and liabilities incurred by the first plaintiffs arising out of, or in connection with, the Loan Facility Agreement.

2. Pursuant to s 90-15 of Sch 2 of the IPSC, the first plaintiffs (in their capacities as administrators of the second plaintiff) are justified in causing the second plaintiff to enter into the Loan Facility Agreement and in drawing down funds pursuant to the Loan Facility Agreement.

*Extension of Time for Registration of Security Interest*

3. Pursuant to s 588FM of the *Corporations Act*, in respect of any security interests created, granted by or in connection with the “General Security Deed” dated 10 August 2022 in the form exhibited at pages 188 to 234 of Exhibit TDB-1 to the Birch Affidavit (**General Security Deed**), as amended by the deed exhibited as JN-1 to the affidavit of Jeremy Nipps sworn on 12 August 2022, the registration time for the collateral is fixed to be, for the purposes of s 588FL(2)(b)(iv) of the *Corporations Act*, 6 September 2022 (being the time that is the end of 20 business days after the date of the General Security Deed that gives rise to the security interests that come into force).

*Notice of these orders and other matters*

4. The first plaintiffs take all reasonable steps to cause notice of these orders to be given, within two (2) business days’ of making these orders to:

(a) the creditors (including persons claiming to be creditors) of the second plaintiff in the following manner:

(i) where the first plaintiffs have an email address for a creditor, by notifying each such creditor, via email, of the making of the orders;

(ii) where the first plaintiffs do not have an email address for a creditor, but have a postal address for that creditor, by notifying each such creditor, by post, of the making of the orders; and

(iii) where the first plaintiffs do not have an email address or postal address, by publishing the notice on the website maintained by the first plaintiffs;

(b) the Australian Securities and Investments Commission, by its street address, or email address.

5. Liberty to apply be granted to any person, including any creditor of the second plaintiff or the Australian Securities and Investments Commission, who can demonstrate sufficient interest to vary the orders sought on the giving of two (2) business days’ notice to the plaintiffs, and to the Court.

6. The first plaintiffs' costs and expenses of and incidental to the originating process are to be treated as costs in the administration of the second plaintiff.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

## REASONS FOR JUDGMENT

**MOSHINSKY J:**

### Introduction

1 By their originating process filed on 11 August 2022, the first plaintiffs (the **Administrators**), who are the administrators of the second plaintiff (the **Company**), sought, in summary:

(a) pursuant to s 447A(1) of the *Corporations Act 2001* (Cth) and s 90-15 of the *Insolvency Practice Schedule (Corporations)*, being Sch 2 to the *Corporations Act* (**IPSC**), an order relieving the Administrators of personal liability under s 443A of the *Corporations Act* in relation to a funding agreement between the Company and its parent, Firesafe Group Pty Ltd (**Firesafe**) dated 5 August 2022 (the **Loan Facility Agreement**); and

(b) pursuant to s 588FM of the *Corporations Act*, an order giving effect to a security interest over the Company's assets granted to Firesafe by a general security deed between the Company and Firesafe dated 10 August 2022 (the **General Security Deed**), in order to avoid the immediate vesting of the security interest in the Administrators that would otherwise occur by operation of ss 588FL(2)(b)(ii) and 588FL(7)(b) of the *Corporations Act*.

2 The application was heard on an urgent basis at 1.00 pm on 12 August 2022. At the conclusion of the hearing I made orders substantially to the effect sought in the originating process, and said that I would publish my reasons later. The following are my reasons for making the orders.

3 The plaintiffs relied upon the following affidavits:

- (a) an affidavit of Thomas Donald Birch sworn on 11 August 2022 (**Birch Affidavit**);
- (b) an affidavit of Brett Orzel sworn on 11 August 2022 (**Orzel Affidavit**);
- (c) an affidavit of Jeremy Nipps sworn on 12 August 2022 (**Nipps Affidavit**); and
- (d) an affidavit of Hugh Alexander Farquhar affirmed on 12 August 2022 (**Farquhar Affidavit**).

4 The creditors of the Company and the Australian Securities and Investments Commission (**ASIC**) were notified of the application at approximately 4.10 pm on 11 August 2022: see paragraphs 8-11 of the Orzel Affidavit. The plaintiffs' outline of submissions

(received a short time before the hearing on 12 August 2022 commenced) stated that “to date no objection has been taken in relation to the orders sought in the Originating Process”, referring to the Farquhar Affidavit at paragraph 6.

## **Background**

5 The following summary of the background facts is substantially based on the plaintiffs’ outline of submissions, which is in turn based on the affidavit evidence.

6 The Administrators were appointed over the Company on 5 August 2022 by resolution of the Company’s board under s 436A of the *Corporations Act*.

7 The Company is engaged in the design, fabrication, installation and servicing of a range of fire protection services and equipment. It has approximately 52 employees and is a wholly-owned subsidiary of Firesafe. Its principal place of business is in Geelong, in premises rented from Firesafe. The Company also leases an additional site in Port Melbourne from an unrelated entity.

8 In the week since their appointment, the Administrators have:

- (a) notified creditors of their appointment;
- (b) undertaken investigations into the Company’s financial position and commenced their counterfactual analysis of a liquidation scenario for the Company and its creditors;
- (c) held preliminary discussions in relation to a deed of company arrangement (**DOCA**) proposal;
- (d) continued to trade the business of the Company as a going concern;
- (e) commenced an immediate process for sale, and published advertisements for the sale and/or recapitalisation of the Company with expressions of interest closing on 19 August 2022;
- (f) taken a preliminary review of the Company’s financial position and identified:
  - (i) cash reserves of approximately \$450,000;
  - (ii) unsecured creditors totalling approximately \$18 million (comprising related-party creditors’ claims of approximately \$10.1 million, the Australian Taxation Office (**ATO**) claim for approximately \$6.7 million and trade creditors’ claims totalling approximately \$1.4 million);
  - (iii) a number of secured creditors with claims yet to be assessed;

- (iv) employee leave liabilities and superannuation owing of approximately \$500,000; and
- (v) trading losses during the “Pandemic Period” since March 2020 and a current inability to meet its liabilities; and
- (g) formed the preliminary view the Company’s financial predicament arises from historical project losses, an inability to pay the ATO debt, and an inability to agree a manageable payment plan with the ATO.

### ***The Key Documents***

9 The Administrators formed the view that:

- (a) continuing to trade the Company’s business while exploring the possibility of a DOCA, sale as a going concern or recapitalisation would maximise the ultimate return to creditors; and
- (b) given their personal liability under s443A of the *Corporations Act*, the Administrators were unwilling to allow the Company to continue to trade absent some form of funding agreement.

10 Accordingly, the Administrators negotiated and entered into a suite of documents (the **Key Documents**) comprising:

- (a) the Loan Facility Agreement;
- (b) the General Security Deed; and
- (c) a trading deed dated 5 August 2022 authorising the Company’s directors to continue trading the Company’s business until termination under supervision of the Administrators (the **Trading Deed**).

11 An amendment was subsequently made to the General Security Deed: see paragraph 8 of the Nipps Affidavit.

12 Importantly, entry into the Key Documents has:

- (a) avoided the immediate need to terminate 52 employees upon appointment of the Administrators;
- (b) enabled the Company to continue to operate as a going concern whilst the Administrators test the market for a sale, DOCA or recapitalisation; and



(c) avoided the immediate crystallisation of contingent liabilities arising from non-performance of contracts with the Company's clients.

13 The significant operative terms of the Key Documents are described at pages 9-11 of the Birch Affidavit.

### ***The Loan Facility Agreement***

14 The Loan Facility Agreement enables the Company or its directors to draw down an advance up to the Loan Facility limit of \$1 million in order to:

- (a) pay the costs of the continuing trade of the business of the Company during its voluntary administration;
- (b) fund the Administrators' fees, costs and disbursements; and
- (c) any other purpose expressly agreed between the Company and Firesafe in writing.

15 Interest accrues at 10% per annum, and the amounts advanced under the Loan Facility Agreement are secured by the security interest created under the General Security Deed.

### ***The General Security Deed***

16 Pursuant to clause 7.1.1 of the Loan Facility Agreement, the Company agreed to grant security in favour of Firesafe for the repayment of the amounts owed by the Company to Firesafe under the Loan Facility Agreement.

17 The General Security Deed gives effect to that provision, and serves to secure any amounts advanced by Firesafe under the Loan Facility Agreement. Pursuant to clause 1.1 of the General Security Deed, the Company has agreed to grant Firesafe a PPSA security interest over all of the PPSA personal property and a fixed charge over all other property to secure the payment of the secured money.

18 As indicated above, a drafting error in the original General Security Deed was corrected by further amending deed on 12 August 2022. That amendment confirms that the secured money is limited to the payments and obligations arising under Loan Facility Agreement, and affords no additional security in relation to amounts otherwise owed by the Company to Firesafe.

19 The plaintiffs submit, and I accept, that the relief sought by the Administrators under s 588FM of the *Corporations Act* will not adversely affect the interest of other creditors because:

- (a) it only secures amounts owed under the Loan Facility Agreement, leaving the claims of unsecured creditors unaffected;
- (b) it will be registered on the PPSR after existing security holder's interests, leaving them first in time in relation to their specified collateral; and
- (c) without the funds advanced secured by the General Security Deed, the Administrators would likely need to cease all operations of the business of the Company and terminate all employees immediately, diminishing the prospects of the Company's survival and likely operating to the detriment of all creditors.

### **Applicable principles**

20 The following summary of the applicable principles is substantially based on the plaintiffs' outline of submissions.

### ***Relief from liability***

21 Section 435A of the *Corporations Act* sets out the object of Pt 5.3A of the *Corporations Act*, namely, to provide for the business, property and affairs of an insolvent company to be administered in a way that:

- (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- (b) if that is not possible, results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

22 Section 443A of the *Corporations Act* relevantly provides that an administrator is liable for debts incurred in the performance of their functions and powers as administrator, including for the repayment of borrowed money.

23 In order to avoid the personal liability arising under s 443A of the *Corporations Act* to enable administrators to borrow funds from a third party to facilitate trading during the administration period, it has become common to seek orders altering the operation of that section: see *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* (2020) 144 ACSR 347 (*Virgin*) at [90] per Middleton J, citing *Korda, in*

*the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2017] FCA 1144; 35 ACLC 17-044 at [42] per Markovic J. See also *Dickerson, in the matter of McWilliam's Wines Group Ltd (Administrators Appointed) (No 2)* [2020] FCA 417 (**McWilliams**) per Gleeson J and Hill, *in the matter of Ovato Limited (Administrators Appointed)* [2022] FCA 903 (**Ovato**) per Stewart J.

24 As Stewart J recent observed in *Ovato* at [15]:

Where the continued trade is for the benefit of creditors, personal liability of administrators can be (and has been) excluded, including pursuant to s 447A of the Act, prior to any such liability being incurred.

(Citations omitted.)

25 In *Virgin*, Middleton J stated at [91]:

There can be no doubt that in the appropriate circumstances, personal liability can be excluded with respect to any arrangement where that enables the company's business to continue to trade for the benefit of the company's creditors. Further, s 447A can also be used to avoid liability before it is imposed.

(Citation omitted.)

26 As Middleton J noted in *Virgin* at [89], Sloss J helpfully summarised the principles applicable to applications of this type in *Re Unlocked Ltd (administrators apptd)* [2018] VSC 345 at [60]-[64] as follows:

60 In the leading case of *Secatore, Re Fletcher Jones and Staff Pty Ltd (admins apptd)* [2011] FCA 1493 (**Secatore**), Gordon J stated (at [23]):

Section 447A(1) of the Act empowers the Court, in an appropriate case, to modify the operation of s 443A to exclude personal liability on the part of a voluntary administrator, and to provide that a loan taken by the company via the voluntary administrator is repayable on a limited recourse basis. Orders in similar terms have frequently been made in circumstances where the Court is satisfied that an administrator has entered into a loan agreement or other arrangement to enable the company's business to continue to trade for the benefit of the company's creditors: see, for example, *Re Ansett Australia Ltd* at [49]; *Re Spyglass Management Group Pty Ltd (admin apptd); Mentha (as joint and several admins of Spyglass Management Group Pty Ltd (admin apptd))* (2004) 51 ACSR 432; [2004] FCA 1469 at [6]; *Sims, Re Huon Corporation Pty Ltd (admins apptd)* (2006) 58 ACSR 620; [2006] FCA 1201 at [12]; *Re Malanos* [2007] NSWSC 865 at [13].

61 In such circumstances, courts have held that it is not to be expected that the voluntary administrators should expose themselves to substantial personal liabilities: see eg *Re Renex Holdings (Dandenong) 1 Pty Ltd* [2015] NSWSC 2003, [13] (Black J); *Re Preston (in their capacities as joint and several voluntary administrators of Hughes Drilling Ltd)* [2016] FCA 1175 (**Hughes**

*Drilling*), [18] (Yates J). See also *Korda, in the matter of Ten Network Holdings Ltd* [2017] FCA 1144, [43]-[44] (Markovic J).

62 In *Secatore*, Gordon J also observed (at [29]) that if orders are made relieving administrators from personal liability in respect of borrowings, it will permit them to make commercial decisions about the ongoing operations by focussing on what is in the best interests of the creditors ‘uninfluenced by concerns of personal liability.’

63 In *Re Great Southern Infrastructure Pty Ltd; Ex parte Jones* [2009] WASC 161 (*Great Southern*) at [13], Sanderson M observed that:

The material consideration on such an application is whether the proposed arrangements are in the interests of the company’s creditors and consistent with the objectives of Pt 5.3A of the Act. To put that proposition positively – the question is whether the court is satisfied the proposed arrangements are for the benefit of the company’s creditors. To put it negatively – the question is whether the court is satisfied the company’s creditors are not disadvantaged or prejudiced by the proposed arrangement. These principles have been confirmed in a large number of cases.

64 In *Re Mentha (in their capacities as joint and several administrators of the Griffin Coal Mining Company Pty Ltd (admins apptd))* (2010) 82 ACSR 142; [2010] FCA 1469, Gilmour J summarized the principles governing the granting of an application for orders under s 447A to vary the liability of administrators under s 443A as follows (at [30]):

- (a) the proposed arrangements are in the interests of the company’s creditors and consistent with the objectives of Part 5.3A of the Corporations Act: *Re Great Southern* at [13].
- (b) typically the arrangements proposed are to enable the company’s business to continue to trade for the benefit of the company’s creditors: *Re Malanos* at [9] and *Re View* at [17].
- (c) the creditors of the company are not prejudiced or disadvantaged by the types of orders sought and stand to benefit from the administrators entering into the arrangement: *Re View* at [18], and also *Re Application of Fincorp Group Holdings Pty Ltd* [2007] NSWSC 628 at [17].
- (d) notice has been given to those who may be affected by the order: *Re Great Southern* at [12].

27 The Court is empowered under s 90-15 of the IPSC to make such orders as it sees fit in relation to the administration of a company. As Black J explained in *In the matter of RCR Tomlinson Ltd (administrators appointed)* [2018] NSWSC 1859 at [14]:

The Court’s preparedness to grant such a direction [under s 90-15 of the IPSC to borrow loan money] in those circumstances reflects the intrinsic unfairness of leaving a voluntary administrator to be at risk of liability, in respect of a complex decision of that kind, where any decision that is made, including making no decision, will have inevitable risks for some or all of the affected constituencies.

***Extension of time under s 588FM of the Corporations Act***

28 Without an order under s 588FM extending the registration time for the purposes of s 588FL(2)(b)(iv) of the *Corporations Act*, the security interests created by the General Security Deed would automatically vest in the Company because:

(a) s 588FL(2)(b)(ii) of the *Corporations Act* captures security interests registered after the “critical time” (here, the date of appointment of the Administrators by operation of ss 588FL(7) and 513C of the *Corporations Act*); and

(b) by operation of s 588FL(4) of the *Corporations Act*, the security interest automatically vests in the Company at the time it otherwise becomes enforceable against third parties.

29 Hence the deadline for registering the security interest to avoid automatic vesting was upon the Administrators’ appointment (which was, of course, prior to entry into the General Security Deed).

30 As Gleeson J observed in *McWilliams* at [34]-[37]:

34 The operation of the legislative scheme was explained by Greenwood J in *Hill (Administrator) in the matter of Flow Systems Pty Ltd (Administrators Appointed)* [2019] FCA 35 (***Flow Systems***) at [60]-[61] and [65].

35 It is now well established that s 588FL applies to the grant of security interests when a company is under external administration, such that the relevant security interests will vest in the company unless an order is made stipulating a later time pursuant to s 588FM: *K.J. Renfrey Nominees Pty Ltd (Trustee), in the matter of OneSteel Manufacturing Pty Ltd v OneSteel Manufacturing Pty Ltd* [2017] FCA 325; (2017) 120 ACSR 117 at [22] and [24]; *Ten Network* at [60]-[64]; *Flow Systems* at [65].

36 By s 588FM(2), the Court may make an order fixing a later time for the purposes of s 588FL(2)(b)(iv) if it is satisfied that, relevantly:

(a) the failure to register the collateral earlier:

...

(ii) is not of such a nature as to prejudice the position of creditors or shareholders; or

(b) on other grounds, it is just and equitable to grant relief.

37 The type of prejudice that is of particular relevance is prejudice attributable to the delay in registration: *Re Appleyard Capital Pty Ltd; 123 Sweden AB v Appleyard Capital Pty Ltd* [2014] NSWSC 782; (2014) 101 ACSR 629 at [30].

## Consideration

31 The affidavit material establishes that, by negotiating the Key Documents, the Administrators have enabled the Company to continue to operate as a going concern while they test the market for a sale, DOCA or recapitalisation.

32 I note that the Administrators consider that the best interests of the creditors of the Company are served by the continued trading of the Company, at least in the short term, in order to maximise the prospects of preserving the Company's business as a going concern.

33 As in *Ovato* (see at [21]), the Administrators have appropriately limited the relief they are seeking from personal liability under s 443A to their obligations under the Loan Facility Agreement.

34 In the circumstances described in the affidavit material and summarised above, I consider it appropriate to make an order relieving the Administrators of personal liability in relation to the Loan Facility Agreement in the terms proposed by the plaintiffs. Such an order is consistent with the object of Pt 5.3A of the *Corporations Act* (as set out above).

35 In relation to the extension sought under s 588FM, in the circumstances described in the affidavits and summarised above, I consider it to be just and equitable that the registration time for the collateral be fixed to be, for the purposes of s 588FL(2)(b)(iv) of the *Corporations Act*, 6 September 2022 (being the time that is the end of 20 business days after the date that the General Security Deed came into force).

36 The s 588FM order is appropriate in the circumstances because:

- (a) there is no prejudice to creditors generally;
- (b) there is no displacement of the priority of other parties with a PPSR registration;
- (c) no creditor or other interested party has raised any objection to the relief sought; and
- (d) the granting of the security interest under the General Security Deed was part of the suite of Key Documents that will enable the Administrators to trade and seek to sell the business of the Company as a going concern, or otherwise secure recapitalisation or an acceptable DOCA proposal.

## **Conclusion**

37 It was for the above reasons that I considered it appropriate to make orders substantially in the terms sought in the originating process.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky.

Associate:

Dated: 18 August 2022